

IN THE SUPREME OF TENNESSEE

AT NASHVILLE

<i>SONNY LUTHER JOHNSON</i>	}	<i>MAURY CHANCERY</i>
	}	<i>No. Below 96-140</i>
<i>Plaintiff/Appellee</i>	}	
	}	<i>Hon. Jim T. Hamilton</i>
vs.	}	
	}	<i>No. 01S01-9804-CH-00079</i>
<i>TRANSPORTATION UNLIMITED, INC.</i>	}	
	}	<i>AFFIRMED IN PART</i>
	}	<i>REVERSED IN PART</i>
<i>Defendant/Appellant</i>	}	<i>MODIFIED AND REMANDED</i>

FILED
September 20, 1999
Cecil Crowson, Jr.
Appellate Court Clerk

JUDGMENT ORDER

This case is before the Court upon the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference.

Whereupon, it appears to the Court that the Memorandum Opinion of the Panel should be accepted and approved; and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs will be paid one-half to each party, for which execution may issue if necessary.

IT IS SO ORDERED on September 20, 1999.

PER CURIAM

IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS' COMPENSATION APPEALS PANEL
AT NASHVILLE
(March 31, 1999 Session)

SONNY LUTHER JOHNSON,
Plaintiff,
v.
TRANSPORTATION UNLIMITED,
INC.,
Defendant.

MAURY CHANCERY

Hon. Jim T. Hamilton,
Judge.

No. 01S01-9804-CH-00079

FILED

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**Cecil Crowson, Jr.
Appellate Court Clerk**

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MEMORANDUM OPINION

Members of Panel:

Frank F. Drowota, III, Associate Justice
Thomas W. Brothers, Special Judge
Joe C. Loser, Jr., Special Judge

AFFIRMED IN PART
REVERSED IN PART
MODIFIED AND REMANDED

Loser, Judge

MEMORANDUM OPINION

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e)(3) for hearing and reporting of findings of fact and conclusions of law. In this appeal, the defendant or employer, Transportation Unlimited, insists the trial court erred in

denying its Tenn. R. Civ. P. 52¹ motion to amend or make specific findings of fact, that the trial court's award of permanent disability benefits based on eighty-five percent to the body as a whole is excessive under the circumstances, that the trial court erred by awarding an amount in excess of the maximum total benefit allowed by law, that the trial court erred in awarding the plaintiff permanent and temporary disability benefits for carpal tunnel syndrome where the plaintiff's only proof in that regard was testimony of a ten percent medical impairment for carpal tunnel syndrome to which was ascribed no cause or permanency, and that the trial judge abused his discretion in adjudging a twenty-five percent (25%) bad faith penalty against Transportation Unlimited for failure to pay temporary total disability benefits. The plaintiff or employee, Sonny Luther Johnson, insists the trial court erred by admitting into evidence a certain videotape, that the trial court erred in failing to award permanent total disability benefits, that the penalty should be increased because the employer has failed to provide medical benefits as required and that the appeal is frivolous. The plaintiff has filed a motion for consideration of post-judgment facts. As discussed below, the panel has concluded the award of permanent partial disability benefits should be affirmed, the award of temporary total disability benefits and penalty should be reversed, the admission of the videotape into evidence was not reversible error, the judgment should be modified to avoid exceeding the maximum total benefit, and that the motion for consideration of post-judgment facts is without merit.

Issues of fact have been reviewed *de novo* upon the record of the trial court, accompanied by a presumption of correctness of the findings of fact, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2). All other issues have been reviewed *de novo*, without any presumption of correctness. Spencer v. Towson Moving and Storage, Inc., 922 S.W.2d 508 (Tenn. 1996).

At the time of the trial, the employee or plaintiff, Johnson, was 54 years old and had worked for Transportation Unlimited since 1991 as a truck driver. He has suffered numerous injuries occurring at different times in the course of that employment. On January 17, 1995, while tying down a car on his trailer, he lost his balance and fell backwards, suffering immediate pain to his neck and left shoulder and arm. On April 10, 1995, he was involved in a vehicular accident, injuring his shoulder, neck and back. On May 15, 1995, he felt severe pain in his left shoulder, arm, hand and fingers while loading skids onto his truck. On October 5, 1995, he felt severe pain in his left shoulder, arm, hand and fingers while unchaining a vehicle on his trailer. Finally, on January 31, 1996, a stool on which he was sitting while his truck was being washed collapsed and he fell, injuring his neck, lower back and left shoulder, arm, fingers and hand. He has seen approximately twenty different doctors for treatment of his injuries or evaluation of his condition.

The trial court's judgment was entered on December 12, 1997 and included specific findings as to the extent of the plaintiff's permanent disability without apportioning the disability among the various accidents. The employer contends that was error because it has a subrogation claim pending as a result of the most recent injury and because the award of permanent partial disability benefits, it contends, may have exceeded the maximum allowed by Tenn. Code Ann. § 50-6-241(a) and (b), without making the specific findings required by subsection (c) of that section.

¹**RULE 52**

FINDINGS BY THE COURT

52.01. Findings Required up on Request. -- In all actions tried upon the facts without a jury, and upon a request made by any party prior to the entry of judgment, the court shall find the facts specially and shall state separately its conclusions of law thereon and direct the entry of the appropriate judgment. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rules 41.02 and 65.04(6).

52.02. Amendment. -- Upon motion of a party made not later than thirty (30) days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may be raised on appeal whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment.

As to the first contention, we find the trial court's findings to be adequate. Moreover and as discussed below, we are not persuaded the trial court's award exceeded the statutory maximum.

The employer next insists the award of permanent partial disability benefits based on eighty-five percent to the body as a whole is excessive and that the evidence preponderates against any finding that the employee's carpal tunnel syndrome is work related. Once the causation and permanency of an injury have been established by expert testimony, the trial judge may consider many pertinent factors, including age, job skills, education, training, duration of disability, and job opportunities for the disabled, in addition to anatomical impairment, for the purpose of evaluating the extent of a claimant's permanent disability. Tenn. Code Ann. § 50-6-241(b). The opinion of a qualified expert with respect to a claimant's clinical or physical impairment is a factor which the court will consider along with all other relevant facts and circumstances, but it is for the court to determine the percentage of the claimant's industrial disability. Pittman v. Lasco Industries, Inc., 908 S.W.2d 932 (Tenn. 1995). In order to establish that an injury was one arising out of the employment, the cause of the death or injury must be proved; and if the claim is for permanent disability benefits, permanency must be proved. Hill v. Royal Ins. Co., 937 S.W.2d 873 (Tenn. 1996). In all but the most obvious cases, causation and permanency may only be established through expert medical testimony. Thomas v. Aetna Life and Cas. Co., 812 S.W.2d 278 (1991). Absolute certainty on the part of a medical expert is not necessary to support a workers' compensation award, for expert opinion must always be more or less uncertain and speculative; Kellerman v. Food Lion, Inc., 929 S.W.2d 333 (Tenn. 1996); and, where equivocal medical evidence combined with other evidence supports a finding of causation, such an inference may nevertheless be drawn under the case law. White v. Werthan Industries, 824 S.W.2d 158 (Tenn. 1992).

When the medical testimony differs, the trial judge must choose which view to believe. In doing so, he is allowed, among other things, to consider the qualifications of the experts, the circumstances of their examination, the information available to them, and the evaluation of the importance of that information by other experts. Orman v. Williams Sonoma, Inc., 803 S.W.2d 672 (Tenn. 1991). Moreover, it is within the discretion of the trial judge to conclude that the opinion of certain experts should be accepted over that of other experts and that it contains the more probable explanation. Hinson v. Wal-Mart Stores, Inc., 654 S.W.2d 675, 675-7 (Tenn. 1983).

It appears from the record that the trial judge gave great weight to the medical testimony of Drs. Joseph Boals and Felix Savoie. Dr. Savoie is an orthopedic surgeon specializing in treatment of shoulder and elbow injuries. He operated on the plaintiff for his shoulder injury and assessed a permanent impairment rating of six percent to the left upper extremity, from appropriate guidelines. He also opined that the plaintiff's neck and back injuries, as well as left carpal tunnel syndrome were causally related to the plaintiff's work for the employer. He has impressive credentials.

Dr. Boals opined that the plaintiff would retain permanent impairments, based on appropriate guidelines, of six percent to the body as a whole for his neck injury, seven percent to the body as a whole for back injuries, nineteen percent to the left upper extremity for shoulder injuries and an additional ten percent to the left upper extremity for untreated carpal tunnel syndrome. The doctor did not convert those ratings to a single combined impairment rating.²

Dr. Boals restricted the plaintiff from performing any type of heavy work, including truck driving, lifting, twisting and bending, overhead lifting, lifting more than fifteen pounds or any frequent lifting, and from running, walking, standing or sitting for long periods of time. He opined that the plaintiff is permanently disabled from returning to this job as a truck driver and that his injuries were work related.

The employee's primary treating physician during 1995 was Dr. Jimmy D.

² The guidelines used and identified in the record would reflect a combined impairment rating of thirty percent to the body as a whole.

Miller, a board certified neurosurgeon. Dr. Miller estimated the plaintiff's permanent impairment at eight percent to the body as a whole and opined that truck driving does not cause carpal tunnel syndrome. Dr. Kenneth Gaines performed a neurological examination on October 30, 1997 and found no significant abnormalities. Dr. James C. Varner provided some conservative care for the employee's neck, lower back and shoulder injuries after the 1996 accident, but before the shoulder surgery. It was Dr. Varner's opinion that the injuries were work related but not permanent. Dr. Joseph Hudson treated and examined the employee after the 1996 accident. He ordered magnetic resonance imaging and found no evidence of a permanent injury.

All of the doctors who expressed opinions are eminently qualified to do so and were in a good position to assess the plaintiff's condition. It does appear from the record that Drs. Boals and Savoie conducted the most thorough examinations and, as already noted, it was Dr. Savoie who performed corrective shoulder surgery. Thus, we cannot say, as the employer contends, that the trial judge abused his discretion by accepting their testimony to the exclusion of the other medical evidence.

Where an injured worker is entitled to receive permanent partial disability benefits to the body as a whole, and the pre-injury employer does not return the employee to employment at a wage equal to or greater than the wage the employee was receiving at the time of the injury, the maximum permanent partial disability award that the employee may receive is six times the medical impairment rating. Tenn. Code Ann. § 50-6-241(b). If a court awards a multiplier of five or greater, then the court must make specific findings of fact detailing the reasons for its award, considering all relevant factors, including lay and expert testimony, the employee's age, education, skills and training, local job opportunities and capacity to work at types of employment available in claimant's disabled condition. Tenn. Code Ann. § 50-6-241(b). Mr. Johnson has not returned to work for the employer.

A medical or anatomical impairment rating is not always indispensable to a trial court's finding of a permanent vocational impairment; anatomical impairment is distinct from the ultimate issue of vocational disability; and a medical expert's characterization of a condition as "chronic" and the placement of permanent medical restrictions is sufficient to prove permanency. Walker v. Saturn Corp., 986 S.W.2d 204, 207 (Tenn. 1998), citing Hill v. Royal Ins. Co., 937 S.W.2d 873, 876 (Tenn. 1996). Moreover, trial courts are not bound to accept physicians' opinions regarding the extent of a claimant's disability, but should consider all the evidence, both expert and lay testimony, to decide the extent of an employee's disability. Id. at 208. Additionally, the employer takes the employee with all pre-existing conditions, and cannot escape liability when the employee, upon suffering a work-related injury, incurs disability far greater than if he had not had the pre-existing conditions. Rogers v. Shaw, 813 S.W.2d 397 (Tenn. 1991).

An injured employee is competent to testify as to his own assessment of his physical condition and such testimony should not be disregarded. Walker v. Saturn Corp., 986 S.W.2d 204, 208 (Tenn. 1998). The plaintiff testified that he was no longer able to perform his duties as a truck driver, that he cannot drive or even sit for long periods of time, that he continually takes strong pain medication and that he is unable to perform his previous occupations as a debit agent, used car dealer or bass fisherman.

The accident which triggered the employee's permanent disability occurred in January of 1996, when he fell from a stool. In light of Dr. Boals' testimony concerning the employee's multiple impairments, we are unable to conclude that the award of permanent partial disability benefits based on eighty-five percent to the body as a whole is five or more times the medical impairment rating. The evidence fails to preponderate against the trial court's award of permanent partial disability benefits.

The employer next contends that the award exceeds the maximum total benefit in effect at the time of the injury. The maximum total benefit is an amount equal to 400 weeks times the maximum weekly benefit. Tenn. Code Ann. § 50-6-102(a)(6)(C). For injuries occurring on or after July 1, 1994 through June 30, 1995, the maximum weekly benefit is an amount equal to sixty-six and two-thirds percent of the employee's average weekly wage up to eighty-six and eight-tenths percent of the state's average weekly wage as determined by the department of employment security. Tenn. Code Ann. § 50-6-102(a)(7)(A)(v). For injuries occurring on or after July 1, 1995, through June 30, 1996, the maximum weekly benefit is an amount equal to sixty-six and two thirds percent of the employee's average weekly wage up to

ninety-one and two-tenths percent of the state's average weekly wage as determined by the department of employment security. Tenn. Code Ann. § 50-6-102(a)(7)(A)(vi).

The maximum weekly benefit - and the employee's compensation rate - is \$415.87, in this case. Thus, the maximum total benefit is 400 times \$415.87, or \$166,348.00. However, that amount does not include the cost of medical benefits, penalties, interest and costs. The judgment is accordingly modified to the extent necessary for limiting the total award of disability benefits to \$166,348.00 for all disabilities, temporary and permanent, resulting from the 1996 injury. The employer is not entitled to credit for temporary disability benefits paid for injuries occurring before the 1996 injury. The record does not reflect payment of any permanent disability benefits before the 1996 injury, on which this award is predicated.

The employer next insists the evidence preponderates against the trial court's finding that the employee's carpal tunnel syndrome arose out of the employment or is permanent. An accidental injury arises out of one's employment when there is apparent to the rational mind, upon a consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Fink v. Caudle, 856 S.W.2d 952 (Tenn. 1993). The medical proof, particular the testimony of Drs. Savoie and Boals, provide the required causal connection and the testimony of Dr. Boals provides the permanency. Dr. Boals, as above noted, assigned a permanent impairment rating of ten percent to the left upper extremity for carpal tunnel syndrome or "entrapment neuropathy of the median nerve at the wrist."

The next issue is whether the trial court erred in awarding a 25% penalty for unpaid temporary total disability benefits. When an employer wrongfully fails to pay an employee's claim for temporary total disability payments, the employer shall be liable, in the discretion of the court, to pay the employee, in addition to the amount due for temporary total disability payments, a sum not exceeding twenty-five percent of such temporary total disability claim; provided, that it is made to appear to the court that the refusal to pay such claim was not in good faith and that such failure to pay inflicted additional expense, loss or injury upon the employee; and provided further, that such additional liability shall be measured by the additional expense thus entailed. Tenn. Code Ann. § 50-6-225(k).

The trial court awarded, in addition to permanent partial disability benefits, forty-three weeks of temporary total disability benefits for the employee's carpal tunnel syndrome, plus a penalty of twenty-five percent, and ordered that those benefits, including the penalty, continue until the defendant provides the employee with medical treatment for the condition.

While there is evidence of some disability resulting from the plaintiff's carpal tunnel syndrome, the preponderance of the evidence is that he is unable to work because of his other injuries and that the carpal tunnel syndrome may very well resolve itself without any additional medical care, as Dr. Boals testified. We find in the record no evidence that the claimant was disabled from working solely because of his carpal tunnel syndrome. Moreover, we find in the record no evidence that the plaintiff suffered any additional expense, loss or injury because of the employer's failure to recognize his carpal tunnel injury. Accordingly, the award of additional temporary total disability benefits and a twenty-five percent penalty for bad faith is reversed. However, the plaintiff is not required to refund the temporary total disability benefits already paid for his disabling shoulder injury, and the employer is entitled credit only to the extent necessary to avoid exceeding the maximum total benefit.

The next issue involves the admissibility of a videotape of the plaintiff washing an antique car and showing it at a car show. The investigator who operated the video camera and identified the tape had not viewed the tape before identifying it. The plaintiff contends, therefore, that it was not properly identified or authenticated as required by Tenn. R. Evid. 901(b). Even if the admission of the tape was error, which we do not hold, it was harmless in view of our conclusions concerning the other issues. Moreover, both the plaintiff and his wife admitted that he washed and showed his antique car in an effort to sell it to raise money for living expenses, but that he was unable to sell it at what he considered a fair price.

The plaintiff insists the trial court erred in not awarding benefits for permanent total disability. When an injury, not otherwise specifically provided for in the Workers' Compensation Act, totally incapacitates a covered employee from working at an

occupation which brings him an income, such employee is considered totally disabled. Tenn. Code Ann. § 50-6-207(4)(B). The definition focuses on an employee's ability to return to gainful employment. Davis v. Reagan, 951 S.W.2d 766 (Tenn. 1997). Although a vocational expert testified that the plaintiff was unable to do anything, the undisputed medical proof is that he is able to do light work, and the court's finding is supported by evidence of the plaintiff's experience in the automobile business. The evidence thus fails to preponderate against the trial court's finding that the plaintiff is not permanently and totally disabled.

The plaintiff's contention that the award of temporary total disability benefits and the penalty thereon is inadequate is without merit, for reasons already stated. However, if medical care is reasonably necessary for the further treatment of any of his compensable injuries, the employer must provide it.

The motion for consideration of post-judgment facts is without merit and is disallowed. The case is remanded to the chancery court of Maury County for an award of interest on unpaid benefits and such further proceedings as may be necessary. Costs on appeal are taxed to the parties, one-half each.

Joe C. Loser, Jr., Special Judge

CONCUR:

Frank F. Drowota, III, Associate Justice

Thomas W. Brothers, Special Judge